Neutral Citation Number: [2019] EWCA Civ 676

Case No: C1/2018/0495

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Honourable Mr Justice Kerr
[2018]EWHC 14 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2019

Before :

LORD JUSTICE BAKER
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

THE QUEEN	**Appellant**
(on the application of COLENE BOSKOVIC)	
- and -	
CHIEF CONSTABLE OF STAFFORDSHIRE POLICE	**Respondent**

- -
- -

David Lock QC and Richard Clarke (instructed by **Haven Solicitors Ltd**) for the **Appellant**
Jonathan Holl-Allen QC and Aaron Rathmell (instructed by **Staffordshire Police and West Midland Police Joint Legal Services**) for the **Respondent**

Hearing date: 6 December 2018

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Approved Judgment

LORD JUSTICE BAKER :

1. The issue arising on this appeal is whether the judge at first instance was wrong to find that the Chief Constable of Staffordshire Police acted lawfully in refusing to exercise the power under regulation 32(2) of the Police (Injury Benefit) Regulations 2006 ("the 2006 Regulations") to refer the appellant's case back to a medical authority for reconsideration of her entitlement to an injury award.

Summary of facts

2. For the purposes of this judgment, the facts can be summarised briefly. The appellant served as a police officer with the Staffordshire force between October 1993 and June 2002. Around the time she joined the force, the appellant got married, but was divorced a few years later. Between December 1997 and June 1998, she was the victim of a series of assaults whilst on duty, as a result of which she was off work for a period. She suffered from depression for which she was prescribed medication. She returned to work in February 1999 but, because of persistent anxiety, she was employed in a non-operational role.

3. In September 1999, she was examined by a consultant psychologist, Dr Khan, who diagnosed mild post-traumatic stress disorder, but also found evidence of acute anxiety and depression. He observed that there was a psychiatric history of the same problems in her family and concluded that she may well have some susceptibility to such symptoms. Noting that she had not to date received "appropriate treatment" for these symptoms, he introduced her to a treatment regime, described in a subsequent report as anxiety management and a "PTSD treatment package". She attended the first two sessions but missed a third, informing the psychologist that she did not particularly want to continue with the treatment.

4. On 28 February 2002, Dr S R Gandham, an occupational health physician employed by the police force and designated as the selected medical practitioner ("SMP") for the purposes of the claim, signed a certificate under the regulations then in force, the Police Pension Regulations 1987. He stated that he had considered the appellant's medical history, and the reports from Dr Khan and the appellant's GP, and had seen her on several occasions between October 2001 and February 2002. He certified that she was suffering from acute anxiety/depression and PTSD. He added:

> "I have decided that (a) the officer is disabled from performing the ordinary duties of a member of the police force (b) the disablement is likely to be permanent …. I recommend that the police authority should consider a review in four years' time to determine whether the … officer has again become capable of performing his [sic] duties as a police officer. I do not recommend that the police authority should at any time consider whether the disablement has ceased …. Based on all available medical information, including appropriate medical reports and my own clinical observations over a period of time, I have come to the conclusion that this person's medical problem is likely to be permanent and hence I can safely label the officer as being permanently incapable of undertaking operational/frontline full police duties for the foreseeable future."

5. The appellant then applied to the Chief Constable, as the relevant police pension authority, for a police injury pension, to which, under regulations set out in more

detail below, a police officer is entitled after ceasing to be a member of the police force where she is permanently disabled as a result of an injury received in the execution of her duty. On 7 June 2002, Dr Gandham recommended that a psychiatric opinion be obtained addressing the question whether the three assaults were the cause of her disability. On 14 June 2002, the appellant was retired from the police force on the grounds of permanent disability. On 16 August 2002, she saw the instructed psychiatrist, Dr Srinivisan, who subsequently prepared a report dated 20 August. He recorded that, following the assaults, the appellant had gradually become averse to working night shifts on her own. In his assessment, he disagreed with Dr Khan's diagnosis of mild PTSD. He stated that the clinical description he had obtained from the appellant did not match the whole range of PTSD symptomatology. He concluded:

> "As to causation of illness, the 'aversion for night shifts' described by [the appellant] was one factor. The aversion was the result of an accumulation of negative experiences, rather than PTSD. I do not believe that work factors were acting in isolation. A positive family history for mental illness that has been elicited is a relevant factor. The acrimony in a relationship break-up at the relevant time also could not be ignored. I believe that the depressive episode suffered by [the appellant] has been multi-factorial in origin.
>
> As to prognosis, [the appellant] reports to be feeling better already. She was not sufficiently encouraged by her progress as to start reducing her medication. She has also tried periods of temp work without any adverse reports. I believe that the prognosis is good and [she] should make a full recovery in due course."

6. On 22 August 2002, Dr Gandham, on the basis of Dr Srinivisan's report, certified that he had decided that the appellant's disability was "moderate to severe depression" and that her disablement "has not been caused or substantially contributed to by an injury … received the execution of duties as a police officer".

7. On 20 September 2002, the appellant appealed against Dr Gandham's decision. In support of her appeal, she obtained a report from a clinical psychologist, Dr Norris, dated 18 March 2003. He found no evidence that she had suffered at any time from PTSD. In his opinion, she did not meet the formal diagnostic criteria for that disorder and those symptoms she reported that were consistent with that disorder were not exclusive to it. He described her psychological problems as a severe and chronic adjustment disorder with mixed anxiety and depressed mood. He found no reason, either from her own account, personal history or medical records, to believe that she was anything other than psychologically normal prior to the assaults. He concluded that her adjustment disorder was principally attributable to events at work. The reasons for this conclusion were the absence of any psychological history, the timing of the onset of her depression and anxiety, the nature of her reported symptoms and the fact that there were no other apparent untoward events occurring in her life at that time which could explain the onset of depression and anxiety.

8. In April 2003, however, the appellant withdrew her appeal. At around the same time, she moved to live in Cyprus for several years. In her statement filed in support of this judicial review claim in November 2016, she explained her reason for withdrawing her appeal in the following terms:

> "My mental health meant that I could not cope with anything that reminded me of the past, especially my service as a police officer. I saw battling to secure a police injury pension as part of my old life, because it continually reminded me of the circumstances in which I had become ill. I now appreciate that my actions of moving abroad were driven by my mental health condition as much as by a desire to get well. I had to get away from anything which could hinder my progress towards better mental health, and the battle to secure my injury pension was a strong reminder of what had made me ill in the first place. I simply didn't have the energy or mental capacity to carry on the fight and so left it all behind when I went to Cyprus."

9. In 2015, following a series of cases in which claimants had been permitted to apply for the reopening of certain pension decisions, the appellant sought legal advice and there ensued a lengthy correspondence with the police force about her claim. In a letter dated 1 April 2016, her solicitors invited the Chief Constable to accept that an incorrect decision was or may have been made in the appellant's case, that she was still living with the consequences of that decision, and that the case should therefore be referred back to a new selected medical practitioner to reconsider the decision. On 29 September 2016, having taken legal advice, the Chief Constable replied in these terms:

> "It is my decision that I do not agree to a further reference of Ms Boskovic to a medical authority for reconsideration of the original refusal of an injury award. This is because I believe that the request is frivolous and vexatious: the delay of 14 years from the original assessment is such that I conclude that no fair consideration is possible. Dr Gandham, the selected medical practitioner who made the original decision to not make an injury award, is no longer licensed to practice in the UK, and neither is Dr Srinivasan, consultant psychiatrist upon whose report Dr Gandham relied. I do not believe the underlying merits of having the case reconsidered have sufficient strength to justify it."

10. On 12 October 2016, the appellant's solicitors sent a letter under the pre-action protocol for judicial review, setting out arguments in support of her claim which substantially anticipate those advanced in the subsequent proceedings. On 2 November 2016, the deputy head of the force's legal services replied confirming the Chief Constable's decision in these terms:

> "In reaching a decision not to refer this matter back … the Chief Constable considered the purpose of the regulations and in particular the provision of an injury award. In this regard, it is only right that consideration is also given to the strength of your client's assertion that Dr Gandham made a mistake in not concluding there was a causal link between her service as an officer and her disabling condition. In relation to this, it is of note that there is inconsistent evidence between the medical professionals involved as to the disabling condition. More recently, Dr Norris has concluded that your client was not suffering from PTSD (in agreement with Dr Srinivasan). In relation to causation, in 2002 when the SMP decision was given, it was certainly not clear cut that there was a causal link between [the appellant]'s service as an officer and her disabling condition. This is clearly important in relation to the passage of time that has now elapsed.

> As a keeper of the public purse, it is right that the Chief Constable (as the Police Pensions Authority) considers her position carefully. Although it is accepted that delay of itself is not reason enough to refuse to refer the matter back to a new SMP as per the reasoning of King J in the ***Howarth*** case, that case involved a challenge to a decision made some four years earlier. In your client's case, the delay has been significantly greater (we are now 14 years on) and delay has to be a relevant consideration for the Chief Constable. In light of the causation difficulties in this case, it is the Chief Constable's view that the length of delay in this case would make it impossible for a fair reconsideration to be undertaken by a new SMP."

11. On 19 December 2016, Ms Boskovic filed her claim for judicial review of the Chief Constable's decision in her letter of 29 September. The claim advanced three grounds: (1) that the decision was unlawful on its face for inadequate reasons and/or a failure to address the primary purpose of a regulation 32(2) reconsideration; (2) breach of article 1 protocol 1 of ECHR, and (3) breach of the public sector equality duty. The Chief Constable filed an acknowledgement of service contesting the claim. On 22 February 2017, Holman J granted the claimant permission to apply for judicial review on ground 1 but refused permission on the other grounds.

12. On 31 October 2017, the hearing of the claim took place before Kerr J. In his judgment dated 12 January 2018, he dismissed the claim with costs but granted permission to appeal to this Court. His reasons for granting permission were that the prospects of success just crossed the threshold required for permission to appeal and that, in his view, there was a compelling reason why the appeal should be heard, namely uncertainty about interpretation of regulation 32 of the 2006 Regulations. On 2 March 2018, the appellant filed her appeal. On 15 March, the Chief Constable filed a respondent's notice identifying an additional ground for upholding the judge's order.

The law

13. The principal regulations governing police pensions in England and Wales are the Police Pensions Regulations 1987. Under regulation A20 of the 1987 Regulations:

> "every regular policeman may be required to retire on the date on which the police pension authority, having considered all the relevant circumstances, advice and information available to them, determine that he ought to retire on the grounds that he is permanently disabled for the performance of his duty:
>
> Provided that a retirement under this regulation shall be void if, after the said date, on an appeal against the medical opinion on which the police pension authority acted in determining that he ought to retire, the board of medical referees decides that the appellant is not permanently disabled."

14. The test to be applied in determining whether a police officer is disabled is set out in regulation A12 of the 1987 Regulations, which provides *inter alia*:

> (1) A reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the

> question arises for decision and to that disablement being at that time likely to be permanent.
>
> …
>
> (2) … disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force ….
>
> …
>
> (3) Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force …
>
> (5) in this regulation, 'infirmity' means a disease, injury or medical condition, and includes a mental disorder, injury or condition."

15. The decision-making process is prescribed in regulation H1 which, so far as relevant to this case, provides:

> "(1) Subject as hereinafter provided, the question whether a person is entitled to any and, if so, what awards under these Regulations shall be determined in the first instance by the police pension authority.
>
> (2) Where the police pension authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions:
>
> (a) whether the person concerned is disabled;
>
> (b) whether the disablement is likely to be permanent.
>
> …
>
> (5) The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to regulations H2 and H3, be final."

Regulations H2 makes provision for an appeal to a board of medical referees, and regulation H3 provides for a further reference to the medical authority. Both regulations are in substantially the same terms as the equivalent regulations 31 and 32 under the 2006 Regulations considered in detail below.

16. Police officers who are required to retire on the grounds of permanent disablement are entitled to a police ill-health pension. A distinction is drawn, however, between an officer whose disablement has been caused by his or her duties as a police officer and an officer whose disablement has no such causal relationship. In the case of the former, the officer is entitled to apply for an additional pension. At the time the appellant left the force, the relevant provisions concerning injury awards were found in the 1987 Regulations. Subsequently, however, those provisions were replaced by the 2006 Regulations. It was agreed before the judge, and before us, that for present

purposes, it is only necessary to consider the provisions concerning injury awards set out in the 2006 Regulations.

17. Regulation 11 of the 2006 Regulations, headed "Police officer's injury award", provides:

> "(1) This regulation applies to a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty (in Schedule 3 referred to as the 'relevant injury').
>
> (2) A person to whom this regulation applies shall be entitled to a gratuity and, in addition, to an injury pension, in both cases calculated in accordance with Schedule 3; but payment of an injury pension shall be subject to the provisions of paragraph 5 of that Schedule and, where the person concerned ceased to serve before becoming disabled, no payment shall be made on account of the pension in respect of any period before he became disabled."

18. "Injury" is defined in Schedule 1 to the 2006 Regulations as including

> "any injury or disease whether of body or of mind".

Under regulation 6(1) of the 2006 Regulations:

> "a reference in these Regulations to an injury received in the execution of duty by a member of a police force means an injury received in the execution of that person's duty as a constable …."

"Disablement" and "infirmity" under the 2006 Regulations are defined respectively in regulation 7(4) and (8) in identical terms to those used in regulation A12(1) and (5) of the 1987 Regulations set out above. Similarly, the process for determining the degree of a person's disablement is defined in regulation 7(5) of the 2006 Regulations in the same terms as in regulation A12(3) of the 1987 Regulations. Under regulation 8:

> "For the purposes of these Regulations disablement … shall be deemed to be the result of an injury if the injury has caused or substantially contributed to the disablement …."

19. The decision-making process under the 2006 regulations is set out in Part 4, headed "Appeals and medical questions". Regulation 30, headed "Reference of medical questions", provides *inter alia*:

> "(1) Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what, awards under these Regulations shall be determined in the first instance by the police pension authority.
>
> (2) Subject to paragraph (3), where the police pension authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions:
>
> (a) whether the person concerned is disabled;

(b) whether the disablement is likely to be permanent

except that, in the case where the said questions have been referred for decision to a duly qualified medical practitioner under regulation H1(2) of the 1987 regulations … a final decision of a medical authority on the said questions under Part H of the 1987 Regulations … shall be binding for the purposes of these Regulations;

and, if they are further considering whether to grant an injury pension, shall so refer the following questions:

(c) whether the disablement is the result of an injury received in the execution of duty, and

(d) the degree of the person's disablement;

and, if they are considering whether to revise an injury pension, shall so refer question (d) above.

…

(6) The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to regulations 31 and 32, be final."

20. Regulation 31, headed "Appeal to board of medical referees", makes provision for an appeal to a board of medical referees against a decision of a SMP under regulation 30(6). Under regulation 31(2), on receipt of grounds of appeal, the police pension authority must notify the Secretary of State and refer the appeal to a board of medical referees. Under regulation 31(3), the decision of the board thereafter shall be final, subject to regulation 32.

21. Regulation 32 is headed "Further reference to medical authority". It provides as follows:

"32(1) A court hearing an appeal under regulation 34 or a tribunal hearing an appeal under regulation 35 may, if they consider that the evidence before the medical authority who has given the final decision was inaccurate or inadequate, refer the decision of that authority to him, or as the case may be it, for reconsideration in the light of such facts as the court or tribunal may direct, and the medical authority shall accordingly reconsider his, or as the case may be its, decision and, if necessary, issue a fresh report which, subject to any further reconsideration under this paragraph, shall be final.

(2) The police pension authority and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him, or as the case may be it, for reconsideration, and he, or as the case may be it, shall accordingly reconsider his, or as the case may be its, decision and, if necessary, issue a fresh report which, subject to any further reconsideration under this paragraph or paragraph (1) or an appeal, where the claimant requests that an appeal of which he has given notice (before referral of the decision under this

> paragraph) be notified to the Secretary of State, under regulation 31, shall be final.
>
> (3) If a court or tribunal decide, or a claimant and the police pension authority agree, to refer a decision to the medical authority for reconsideration under this regulation and that medical authority is unable or unwilling to act, the decision may be referred to a duly qualified medical practitioner or board of medical practitioners selected by the court or tribunal or, as the case may be, agreed upon by the claimant and the police pension authority, and his, or as the case may be its, decision shall have effect as if it were that of the medical authority who gave the decision which is to be reconsidered.
>
> (4) In this regulation a medical authority who has given a final decision means the selected medical practitioner, if the time for appeal from a decision has expired without an appeal to a board of medical referees being made, or if, following a notice of appeal to the police pension authority, the police pension authority have not yet notified the Secretary of State of the appeal, and the board of medical referees, if there has been such an appeal."

22. Regulation 34 provides a procedure for appeals to the Crown Court against certain decisions by the police pension authority.

23. Finally, Part 5 of the 2006 Regulations is headed "Provision and withdrawal or forfeiture of awards" and includes, under regulation 37(1), the following provision for the reassessment of an injury pension:

> "Subject to the provisions of this Part, where an injury pension is payable under these Regulations, the police pension authority shall, at such intervals as may be suitable, consider whether the degree of the pension's disablement has altered; and if after such consideration the police pension authority finds that the degree of the pension's disablement has substantially altered, the pension shall be revised accordingly."

Relevant case law

24. The case law cited to us concerning the interpretation of the relevant provisions in the 2006 Regulations falls into two categories: (a) those principally concerning regulation 30, and (b) those principally concerning regulation 32(2). It is convenient to consider the cases under those headings rather than in the strict chronological order in which they were decided. It should be noted that all of the cases were decided after 2003 when the appellant abandoned her appeal against the SMP's decision.

Cases concerning regulation 30

25. In *R (Doubtfire) v Police Medical Appeal Board* [2010] EWHC 980 (Admin), HH Judge Pelling QC, sitting as a deputy High Court judge, considered an application for judicial review of a decision by a SMP that the claimant was not entitled to an injury pension. The SMP had been appointed to determine whether the claimant was suffering from a disability and, if so, whether it was likely to be permanent. He concluded that he was "confident that the diagnosis is social phobia" and that it was permanent and that she was therefore permanently disabled from carrying on the

duties of a constable. As a result, the claimant was required to retire as a police officer. She then applied for an injury award under the 2006 Regulations, but the SMP concluded that what he had diagnosed as a social phobia was not the result of injury in the execution of her duties. The claimant appealed to the Police Medical Appeal Board, relying on a report from a consultant psychiatrist who had concluded that she suffered from a recurrent depressive disorder and challenged the diagnosis of social phobia as the predominant cause of her permanent disablement. The appeal failed because the board considered it was bound to decide only whether the condition of social phobia had been caused or substantially contributed to by an injury or injuries in the execution of duty. Before Judge Pelling, it was not disputed that, if the board was wrong to have decided that its task was limited in that way, a different conclusion might have been reached on the basis that the claimant was disabled by depression which was a partial cause of her disability and directly and causally connected with service as a police officer.

26. The judge allowed the application, quashed the board's decision, and remitted the matter back to the board for further consideration. He analysed the effect of regulation 30(2) as follows:

> "34. The questions that have to be answered clearly distinguish between (1) whether the officer concerned is (a) disabled and (b) likely to be permanently disabled (which I refer to hereafter as 'the disablement questions') and (2) whether the disablement in question is the result of an injury received in the execution of duty (which I refer to hereafter as 'the causation question'). None of them requires the SMP or board concerned to diagnose the infirmity or injury concerned much less do the regulations make any such diagnosis final. It is only the decisions (1) whether the officer concerned is (a) disabled and (b) likely to be permanently disabled and (2) whether the disablement in question is the result of an injury received in the execution of duty that are final.
>
> 35. Each SMP asked to answer the disablement questions will have to arrive at a diagnosis (or possibly a range of diagnoses) as part of the chain of reasoning leading to the SMP's answer to the question he is asked, not least for the purpose of demonstrating the relevant disablement has been caused by an '… infirmity of mind or body …' as required by regulation 7(4) of the 2006 Regulations (or regulation A12 of the 1987 Regulations) – a concept which is further defined by regulation 7(8) of the 2006 Regulations. However, there is nothing within the 2006 Regulations that requires the SMP (or for that matter the [Board]) considering the causation question to consider itself bound by the diagnosis arrived at by the SMP (or the [Board]). My reasons for reaching these conclusions … in summary are that (a) such a conclusion more naturally arises from the language of the regulations (b) the alternative conclusion is likely to result in anomalous results if not absurd ones whereas (c) that is not or is much less likely to be so if the approach set out above is adopted."

So far as the language of the regulation was concerned, the judge observed (at paragraph 36, that:

> "whilst it is no doubt necessary for an SMP or a Board to arrive at a diagnosis for the purpose of demonstrating that the officer concerned is or is not disabled by an 'infirmity of mind or body' just as it will be necessary for him or it to be satisfied

> that the officer concerned suffers from an inability to perform the ordinary duties of a police officer, it is only the answer to the question whether the officer is disabled that is final, not the reasoning that led to that conclusion."

27. A month after the judgment in ***Doubtfire***, the interpretation of regulation 30 arose at a hearing before this Court in ***Metropolitan Police Authority v Laws and Anor*** [2010] EWCA Civ 1099 [2011] ICR 242. The decision in ***Doubtfire*** was not cited. ***Laws*** concerned a police officer injured in the course of her duties who had been awarded an injury pension based on an assessment of the degree of her disablement, pursuant to regulation 7(5) of the 2006 Regulations, by reference to the degree to which her earning capacity had been affected as a result of the injury, namely 85%. In 2008, on a review under regulation 37(1), the assessment of her disablement was reduced to 25% on the basis that she was now capable of working 75% of normal hours. The claimant appealed to the medical appeal board under regulation 31. In dismissing the appeal, the board challenged the previous assessment of disablement and found that there had been a significant improvement in the claimant's condition since the award was first made. On an application for judicial review, the judge at first instance quashed the board's decision, holding that it had erroneously conducted an entirely fresh assessment of the claimant's degree of disablement and its causes rather than considering whether the degree of disablement had substantially altered since the previous review. On appeal to this Court, the police authority contended that the requirement under the regulations to treat the previous assessment as "final" did not oblige the board to accept all the clinical judgements made in or for the purpose of the previous assessment but only that the pensioner was entitled to whatever pension was then fixed. It was open to the board to arrive at its own assessment under regulation 37(1) by a process of reasoning which might involve a frank departure from earlier clinical judgements.

28. The Court of Appeal dismissed the appeal. In the lead judgment, Laws LJ noted (at paragraph 12) that:

> "the strict point of interpretation involved depends on the relation between regulations 30(6) and 31(3) …. regulation 30(6) provides that the decision of the SMP on the question or questions referred to her shall be final (and regulation 31(3) makes like provision in relation to the board's determination of an appeal from the SMP)."

Rejecting the police authority's argument, Laws LJ said (at paragraph 16):

> "It cannot sit with the language of the 2006 Regulations. The requirement of finality in regulation 30(6) does not merely apply to the percentage figure arrived at to represent the pensioner's disability. It applies to the decision of the SMP 'on the question or questions referred to him under this regulation'. This must include the essential judgment or judgments on which the decision is based."

At paragraph 18 to 19, he continued:

> "18. So much is surely confirmed by the terms of regulation 37(1), under which the police authority (via the SMP/board) are to 'consider whether the degree of the pension's disablement has altered'. The premise is that the earlier decision as to the degree of disablement is taken as a given; and the duty – the *only* duty – is

> to decide whether, since then, there has been a change: 'substantially altered', in the words of the regulation. The focus is not merely on the outturn figure, but on the *substance* of the degree of disablement.
>
> 19. ….The result is to provide a high level of certainty in the assessment of police injury pensions. It is not open to the SMP/board to reduce a pension on a regulation 37(1) review by virtue of a conclusion that the clinical basis of an earlier assessment was wrong ….[T]he clear legislative purpose is to achieve a degree of certainty from one review to the next such that the pension awarded does not fall to be reduced or increased by a change of mind as to an earlier clinical finding where the finding was a driver of the pension then awarded."

29. The most recent case concerning regulation 30 is ***R (Evans) v Chief Constable of Cheshire Constabulary*** [2018] EWHC 952 (Admin) [2018] ICR 1459. In that case, a police officer was required to retire, and awarded a disability pension, on the basis of a report by an SMP pursuant to regulation H1(2) of the 1987 Regulations which advised that he was disabled by reason of back pain and PTSD and that both of those disablements were likely to be permanent. When the officer applied to receive an additional injury pension under the 2006 regulations, the Chief Constable obtained a report from a second SMP, pursuant to regulation 30(2) of the 2006 Regulations, with which the officer was dissatisfied and as a result appealed to the PMAB. That Board in turn found that there was no permanent disablement resulting from an injury received in the execution of duty and refused to award an injury pension. The officer's claim for judicial review succeeded and the decision was quashed, Lane J holding that a final decision of an SMP taken under regulation H1(2) of the 1987 Regulations was binding as regards the same questions of disablement and permanence arising under regulation 30(2)(a) and (b) of the 2006 Regulations when considering whether a person was entitled to an injury pension, and that the reasons underpinning the SMP's answers to those questions were also binding, so that, when considering entitlement to an injury pension by application of regulation 30(2), the role of the second SMP or the PMAB was confined to determining the issues of causation and degree of disablement under regulation 30(2)(c) and (d).

30. Lane J explained the rationale for his conclusion in these terms:

> "36. … The legislature could, of course, have provided for entitlement to an injury pension to be determined solely by reference to criteria set out by the 2006 Regulations. The legislature, however chose not to do so.
>
> 37. There is, in fact, a sound policy reason for that decision. As Mr Lock submitted, police officers who are required to retire on the grounds of permanent disablement are entitled to a degree of finality in respect of their entitlement to pensions. A police officer who has to retire as a result of what is then considered to be permanent disablement caused in the line of duty should not be at the mercy of a subsequent medical assessment that he or she was not, in fact, permanently disabled. That applies to an injury pension as much as it does to a disablement pension. In the absence of statutory wording to the contrary, there is no reason to treat the injury pension as a more fragile form of benefit.
>
> 38. Leaving aside for the moment the case law, as a matter of pure statutory construction of regulation 30, I consider that what is made binding is not just the

> bare answers to questions (a) and (b) but also the reasons (that is to say, the diagnosis) underpinning those answers. Regulation 30(6) provides in terms that the decision 'shall be expressed in the form of report and shall, subject to regulations 31 and 32 [appeals] be final'. By requiring a report, the legislature has, I find, made evident the indivisibility of the answer to the question and the reasons for that answer."

31. Lane J derived support for this interpretation from the dicta of Laws LJ in ***Laws***. Whilst noting that the decision in that case was not binding on him (because it concerned the effect of regulation 37), he considered Laws LJ's observations as to the need for "a high level of certainty in the assessment of police injury pensions" to be "dicta of the most powerful kind". For that reason, he declined to follow the decision of the deputy judge in ***Doubtfire***. Instead, he concluded, at paragraph 44:

> "the diagnosis of the first SMP must be accepted, with all that entails. The second SMP/PMAB then needs to determine, on what it would have to regard as a clinical hypothesis, the issue of causation and the degree of disablement. As regards the latter, Mr Lock pointed to the words 'has been affected as a result of an injury received' in regulation 7(5), which deals with the degree of disablement. The words 'has been' require a backward-looking exercise, by reference to the date of retirement: regulation 43(1). That degree of disablement, once fixed, is then reviewed at regular intervals pursuant to regulation 37."

Cases concerning regulation 32(2)

32. There have been two cases in which regulation 32(2) has been considered at first instance. In ***R (Crudace) v Northumbria Police Authority*** [2012] EWHC 112 (Admin), a retired police inspector applied for judicial review of a decision in 2009 by a SMP under regulation 37 to reduce the level of his injury pension and of a further decision in 2010 by the police authority refusing to agree under regulation 32(2) to refer the matter back to the SMP to reconsider his 2009 decision following the publication of the judgment of this court in ***Laws***. HH Judge Behrens sitting as a deputy High Court judge concluded that the 2009 decision had been flawed and that the review had not been conducted properly in accordance with regulation 37.

33. With regard to the 2010 decision, the deputy judge noted that it was common ground between the parties that, as the discretion to agree to a reference under regulation 32(2) is a discretionary decision made by a public body, it must be exercised so as to promote the policy and objectives of the regulations: ***Padfield and others v Minister of Agriculture, Fisheries and Food and others*** [1968] AC 997. Before him, Mr Holl-Allen, who appeared for the police authority in that case as he does before us, submitted that the clear purpose of regulation 32(2) was not to provide a mechanism for appeal but rather to provide a simple method of reconsideration where the parties agreed to a reference in cases where an appeal is made or where there are judicial review proceedings. The deputy judge rejected the submission. At paragraph 91 of his judgment, he explained:

> "whilst it is true that the regulations do contain references to finality, each of those references is expressly made subject to the power in regulation 32(2). It has to be borne in mind that the regulations are concerned with the provision of pensions for former officers who were disabled in the course of duty through no

> fault of their own. In such a case it may well be thought that the need for accuracy is at least as important as the need for finality."

At paragraph 95 he added:

> "Decisions under regulation 37 are not absolutely final. They are final subject to reconsideration under regulation 32(2). It is not, in my view, a proper reason to refuse to agree to a reconsideration on the basis that the regulation 37 decision is final. Such a reason would deprive regulation 32(2) of its proper effect."

34. A similar conclusion was reached by King J in ***R (Haworth) v Northumbria Police Authority*** [2012] EWHC 1225 (Admin). In that case, the claimant sought the agreement of the police authority under regulation 32(2) to a reference back of her case to the Police Medical Appeals Board for reconsideration. The police authority refused to agree, on the grounds that there had been a considerable passage of time since the decision was made and that it was important that final decisions, once taken, "remain just that". King J upheld the claim for judicial review and quashed the police authority's decision not to agree to refer the decision for reconsideration. At paragraphs 97 to 98 he put forward this interpretation of the statutory scheme:

> "97. … I am persuaded that in the light of the statutory scheme as a whole, there is no reason not to construe regulation 32(2) as in part a mechanism (and indeed an important mechanism) to correct mistakes either as to fact or as to law which have or may have resulted in an officer being paid less than his full entitlement under the regulations, *which cannot otherwise be put right*, which is this case ….
>
> 98. It should in my judgment have been the starting point of any decision-making process by the defendant in deciding whether to give the requested consent in this case to have this purpose in mind and hence the starting point should have been to assess the strengths of the merits of the underlying case sought to be pursued on the reconsideration by the former officer and the long-term likely effect upon her if she were denied the opportunity to have those mistakes corrected."

He expressed agreement with the observations of Judge Behrens in paragraph 91 of his judgment in ***Crudace*** set out above.

35. On the issue of delay, King J stated (at paragraph 100):

> "This is not to say that the fact of delay since the decision sought to be reconsidered was made is entirely irrelevant to the exercise of the police authority's discretion whether to consent to a reconsideration under regulation 32(2). But in my judgment delay can be relevant only to the police authority's assessment of the underlying merits of the application. In an appropriate case the delay may be such that the authority can legitimately conclude that no further consideration is possible, in other words no further resolution of the issues sought to be raised on the reconsideration is possible – for example where material medical records are no longer available. And the longer the delay, I would see nothing improper in the police authority considering more anxiously than might otherwise be the case, whether the underlying merits have sufficient strength to justify re-opening an old case, although in principle I would agree that in the

absence of good reason to the contrary consent should be given if the officer can demonstrate a reasonable case capable of being resolved on a reconsideration that the pension he is being paid is significantly incorrect by virtue of a decision not in accordance with the regulations."

Kerr J's judgment

36. In the course of his judgment, Kerr J considered the interpretation of regulation 32(2) favoured by the judges in the *Crudace* and *Haworth* cases:

> "85. What is the statutory purpose of regulation 32(2)? In two decisions made by judges with much experience and expertise in this field, it has been held that the purpose is to secure the just entitlement of a former officer and not, as was unsuccessfully argued in those cases, to provide a convenient way of giving swift effect to the position agreed between the officer and the PPA. Those decisions are, undeniably, entitled to the highest respect.
>
> 86. In the two decisions, the judges adopted a policy driven, interventionist interpretation of regulation 32(2), which strained the language used in the provision, so as to require the compulsory or closely circumscribed 'agreement' of the PPA to a course that is plainly not consensual in any real sense. Indeed, the 'agreement' of the recalcitrant Chief Constable may have to be wrested from her by judicial review or at least the threat thereof.
>
> 87. There are dangers in construing a provision such as this in a manner that sits so uneasily with the language the legislature has chosen, by an appeal to wider considerations of policy not found in the language of the provision itself. It may be safer to discern the policy of the legislature from the language it has used than to construe the language of the provision by reference to a broad judicial evaluation of the overall policy of the statutory scheme.
>
> 88. If the words 'by agreement' are given their full content and ordinary meaning, they would mean what they say. That would mean the reasoning in *Crudace* and *Haworth* would have to be regarded as unsound. It would have been simple for the legislature to have fashioned regulation 32(2) as an *obligation* on the PPA to refer the matter back for reconsideration if presented with a reasonable case that the original decision was wrong; or to require the agreement of the PPA not to be unreasonably withheld.
>
> 89. For those reasons, I confess to some unease about the interpretation of regulation 32(2) adopted in the two cases. On the other hand, as a matter of broad justice, it has much to commend it. As the judges correctly observed, the references to finality in other surrounding provisions are expressly made subject to regulation 32(2). While that point is consistent with both the competing interpretations, it can be read as supporting the claimant's interpretation rather than that of the defendant.
>
> 90. Furthermore, the importance of securing just pension entitlement is incontestable, as is the injustice arising from wrongly withheld or underpaid pensions for officers who render such important service at everyday risk to life and limb. That point supports the claimant's policy-based interpretation and could

be said to outweigh the defendant's answer that procedural rules and deadlines do not offend justice even where they lead to loss of entitlement.

91. I think the right course, despite my reservations, is to observe judicial comity and assume that the purposive construction of regulation 32(2) adopted by King J and HHJ Behrens is the correct one ….

92. In abbreviated form, the statutory purpose which I assume to be correct is to facilitate and to promote correct pension payments and to correct mistakes. Withholding agreement to a reconsideration which, if it takes place, is likely to enable that to happen is, on that assumption, unlawful. It follows that if the decision letters showed that the purpose of the decision to withhold agreement was to deny the claimant has just pension entitlement, that would be unlawful."

37. The judge reminded himself of the principle derived from the ***Padfield*** jurisprudence that public powers must be exercised in accordance with the statutory purpose whilst noting that there may be other permissible considerations to which a decision maker may have regard provided she does not thereby thwart the statutory purpose. When considering the predominant purpose of the regulation, he concluded:

"97 … it would be unlawful for the defendant to disregard the merits of the claimant's claim to an injury award. The law required the defendant to consider and assess the strength of the argument that Dr Gandham made a mistake when certifying that the three assaults did not cause or materially contributed to the claimant's disabling depressive illness. The defendant did have regard to that argument in this case; on her instructions, in the second letter Ms Dent referred to conflicting medical evidence of the diagnosis and to the issue of causation as 'not clear-cut'."

Turning to other considerations to which the decision maker was entitled to have regard, the judge continued:

"98. Is it permissible for the defendant to take account of delay, other than as a factor in the assessment of whether a fair reconsideration as possible? In my judgment, it is. I see nothing in the statutory scheme which rules out delay *per se* as a permissible consideration. Delay may, obviously, be relevant to whether a fair reconsideration is possible; but it is also relevant to the public interest in finality in determining police pension issues. Reconsideration of the pension issue requires publicly paid staff to be diverted from other important policing functions.

99. I see no warrant for requiring primacy to be given to one relevant consideration over another, provided the statutory purpose is respected. The weight given to a relevant consideration is a matter for the decision-maker, not the court, unless statute provides otherwise. I would not, with great respect, go so far as King J in ***Haworth*** when he said, at paragraph 100, that 'delay can be relevant only to the police authority's assessment of the underlying merits'; and, in the next sentence, that while 'delay may be such that the authority can legitimately conclude that no fair reconsideration as possible', it is not a relevant consideration in its own right."

38. This analysis led the judge the following conclusions:

> "100. Having examined carefully the two decision letters, I find myself unpersuaded that the decision challenged was vitiated by illegitimate reliance on delay. I accept Mr Holl-Allen's submission that the delay was very long here and that it was properly open to the defendant to weigh the length of the delay and the resulting unavailability of Drs Gandham and Srinivasan against the less than 'clear cut' case on causation, to which evidence from Dr Gandham personally would be relevant. That was, moreover, a rational foundation for the proposition that no fair reconsideration was possible, a conclusion which itself bears directly on the merits of the underlying claim for an injury award.
>
> 101. I also ask myself what the predominant purpose of the decision was. It is true that its effect was to prevent the reopening of an injury award claim that, if reopened, might well succeed. But it would succeed, in the defendant's properly held view, only after a reconsideration process that would not be fair. I find that the predominant purpose was to prevent a reconsideration process that would be unfair. The unfairness cannot be overlooked on the ground the claim to an injury award is a strong one. Whether it is or not can only be judged by a fair process, not by an unfair one.
>
> 102. Assuming, as I do, that the statutory purpose of regulation 32(2) is as King J described in the ***Haworth*** case, I do not accept the proposition either that the predominant purpose of the decision-maker was one that was contrary to the statutory purpose, or that her decision was vitiated by taking account of delay as a relevant consideration. The words 'frivolous and vexatious' may not have been very polite, but they do not, read in their context, refer to anything worse than a long delay rendering a fair reconsideration impossible in the defendant's view."

39. As for the reference to the "keeper of the public purse" in the decision letter, the judge considered that the writer had been referring to the cost of the process of reconsideration, rather than the cost of paying an injury pension. He saw nothing in the statutory scheme to make this an impermissible secondary or subsidiary consideration.

The appellant's submissions

40. On behalf of the appellant, Mr David Lock QC and Mr Richard Clarke submitted that the fundamental principle which had been overlooked by the judge, derived from the ***Laws*** judgment, was that, once a medical authority has reached a decision, a later medical authority is bound by what Laws LJ (at paragraph 16 of his judgment as quoted above) described as the "essential judgment or judgments on which the [earlier] decision is based". It followed that, once Dr Gandham, the SMP, had decided at the A20 stage that the appellant suffered from acute anxiety or depression and PTSD, that diagnosis, and the consequential permanent disablement decision, were binding on the SMP at the subsequent injury pension stage.

41. Following on from this overarching submission, Mr Lock helpfully reshaped his case into the following five grounds of appeal.

42. First, he contended that the judge was wrong in failing to decide whether Dr Gandham had made a legal error in refusing the original claim for an injury pension. Whether Dr Gandham had been right or wrong to refuse the pension is a matter of

black letter law, not a matter of opinion. There was plain evidence from multiple sources, including the independent psychiatrist Dr Srinivasan, to support the causation between the appellant's disablement and her service as a police officer. Although the judge had correctly observed at paragraph 97 of the judgment that it would be unlawful for the Chief Constable to disregard the merits of the appellant's claim when considering whether to agree to a further reference under regulation 32(2), he then failed to decide for himself whether Dr Gandham had made an error of law and further failed to decide whether the Chief Constable had properly directed herself on the issue which, Mr Lock submitted, she plainly did not.

43. Secondly, Mr Lock submitted that the judge ought to have found that the Chief Constable was not justified in law in relying on the alleged conflicting medical evidence. In the first letter, the Chief Constable had observed that it was of note that "there is inconsistent evidence between the medical professionals involved as to the disabling condition". Mr Lock submitted that the inconsistency as to the nature of the condition was irrelevant. When it came to considering the application for an injury pension, the only issue that the SMP had to address was the question of causation, namely whether the psychiatric condition which caused her disablement (whatever diagnosis was attached to it) was caused by her service as a police officer. Differences as to the diagnosis of the condition would only be relevant to that question if the doctors identified different causes for the condition. In the event, all the doctors identified her police service as one of the causes of the condition. Following the judgment in ***Laws***, (which was, of course, decided several years later), a new analysis of the medical diagnosis of the appellant's permanent disablement was legally impermissible. Once the SMP decision was made within the regulation A20 process, it was not open to the SMP to conduct a fresh assessment of the causes of her disablement. Thus the differences of view relied on by the Chief Constable were legally irrelevant, a fact which the judge should have recognised in his judgment.

44. Thirdly, Mr Lock submitted that the judge erred in accepting that the Chief Constable was entitled to conclude that a fair reconsideration was not possible. The only issue which required "reconsideration" was the narrow causation question, namely whether the appellant's disablement as found by the SMP was caused or substantially contributed to by the appellant's service as a police officer. Given that the case had been extensively documented at the time of the original claim, a doctor taking the decision today would be in no worse position than Dr. Gandham in 2002. Mr Lock further submitted that fairness required the Chief Constable to be fair not only to the public interest but also to the appellant. In Mr Lock's phrase, it would be "spectacularly unfair" to the appellant to deprive her of an assessment process in these circumstances, given that her disability was the very reason why she abandoned her claim in 2003. He identified the "central paradox" of the case – which he asserted was "not in serious dispute" – as being that the appellant had given up her appeal for an injury pension because she did not have the mental strength to fight for her disability rights.

45. Fourth, it was submitted that the judge was wrong to depart from the reasoning in ***Crudace*** and ***Haworth*** on the relevance of delay and cost. Mr Lock urged this Court to adopt the purposive construction of the regulation preferred by the judges in those cases. He contended that the purpose of regulation 32(2) is to correct mistakes which may have resulted in an officer being paid less than her full entitlement. In this case,

there was overwhelming evidence that such a mistake had been made. In those circumstances, the judge erred in failing to require the Chief Constable to conduct a reconsideration unless there were clear reasons not to do so. Delay might be relevant if it prevented a fair reconsideration, but on the facts of this case it did not because all the material required for a reconsideration of the causation issue was available. In the context of a statutory scheme where there is no time limit for applying for an injury pension and in which the finality provisions are subject to regulation 32(2), the statutory purpose of that regulation would be improperly defeated by treating delay in and of itself as a freestanding sufficient reason for refusing to remedy an obvious error, particularly where the reason for the officer's decision to abandon her appeal in 2003 was the mental health condition which was the very reason why she was entitled to an injury pension.

46. Finally, Mr Lock submitted that the assertion by the Chief Constable that the request for a further reference to medical authority was "frivolous and vexatious" was erroneous, that this was a further reason why her decision was unlawful, and that the judge was wrong to dismiss the use of this phrase as nothing more than a reference to the fact that the long delay rendered a fair reconsideration impossible. Mr Lock argued that such a construction of the decision letter strips the phrase of any meaning.

The respondent's submissions

47. By way of preliminary submission, Mr Jonathan Holl-Allen QC and Mr Aaron Rathmell on behalf of the Chief Constable emphasised that the mechanism of challenge to Dr Gandham's causation decision being adopted by the appellant was not a statutory appeal under regulations 31 or 34, or a judicial review, but a request for the agreement of the Chief Constable to a reconsideration by medical authority under regulation 32(2). The challenge was made 13 years after the appellant withdrew her appeal against that decision. Mr Holl-Allen disputed Mr Lock's assertion that the reason for the appellant's abandonment of her original appeal in 2003 was "not in serious dispute". He drew attention to various statements in the respondent's documents indicating that the circumstances in which the appeal had been withdrawn in 2003 have been in dispute throughout. It was not suggested in 2003 that the appeal was being abandoned because of the appellant's mental health difficulties. The only evidence that she lacked the mental resilience to continue the battle is contained in a witness statement made for the purposes of these proceedings some 13 years later.

48. Mr Holl-Allen also disputed the validity of Mr Lock's overarching submission, said to be based on the decision in ***Laws***, that a new analysis of the medical cause of the appellant's permanent disablement was legally impermissible. Mr Holl-Allen robustly submitted that this argument was not advanced before Kerr J and is in any event wrong. It was the Chief Constable's overarching submission that, whilst any later SMP could not go behind Dr Gandham's findings that the appellant was disabled from performing the ordinary duties of a police officer and that the disablement was likely to be permanent, the diagnoses of the conditions causing the disability were not binding on any subsequent SMP considering the causation question under regulation 30(2)(c). Mr Holl-Allen submits that the decision in ***Laws*** is distinguishable on the grounds that it concerned a review under regulation 37. Such a review is confined to a reconsideration of "whether the degree of the pensioner's disablement has altered". By definition, it only arises where the former officer is already in receipt of an injury award so that the causation question has already been decided in the office's favour.

Mr Holl-Allen submits that the observations of Laws LJ in ***Laws*** at paragraphs 18 and 19 quoted above must be seen in that light.

49. In his written skeleton argument, Mr Holl-Allen pointed out that, if the appellant's arguments were correct, ***Doubtfire*** was wrongly decided. Subsequently, as set out above, the decision in ***Doubtfire*** was not followed by Lane J in ***R (Evans) v Chief Constable of Cheshire Constabulary***. In oral submissions, Mr Holl-Allen invited the court to overrule the decision in ***Evans*** and uphold the decision in ***Doubtfire***.

50. Turning to the appellant's first ground of appeal, Mr Holl-Allen submitted that, as the claim was for a judicial review of the decision not to agree to a reconsideration of the causation question under regulation 32(2), it was not only unnecessary but also inappropriate for the judge to determine whether Dr Gandham's original decision was wrong, as that would have the effect of pre-determining the outcome of the reconsideration sought. He refuted Mr Lock's assertion that the issue of whether the decision was wrong was a matter of black letter law. He submitted that it is in part a matter of fact relating to the interpretation of evidence put before him.

51. With regard to the second ground, it was submitted that the Chief Constable was entitled to rely on the fact that there was conflicting medical evidence. As already stated, it was Mr Holl-Allen's principal submission that the appellant's argument that Dr Gandham, or any subsequent SMP, would be bound by the diagnoses of disabling conditions set out in the original certificate of 20 February 2002 is wrong in law. It was submitted that the question for any SMP considering the appellant's entitlement to an injury pension was whether the appellant's permanent disablement (which could not be challenged) was attributable to an injury sustained in the execution of a duty, and he or she would be free to reach a conclusion on that issue untrammelled by any specific diagnoses. In those circumstances, the Chief Constable was entitled take into account that the evidence relating to diagnosis and causation was not clear cut.

52. As for the third ground of appeal, Mr Holl-Allen argued that the judge was not wrong to accept that the Chief Constable was entitled to conclude that a fair reconsideration was not possible. Any medical authority reconsidering the causation decision in 2016 would be doing so approximately 14 years after Dr Gandham's original assessment, and nearly 20 years after the events occurring in the execution of duty on which the appellant relies. In the context of medical evidence which did not speak with one voice as to the impact, if any, of the events at work on her disability, such an exercise would, at the very least, be difficult. The issue of whether, by reason of delay and other factors, her disablement was the result of an injury received in the execution of duty could be accurately and fairly reconsidered by medical authority was one on which the Chief Constable was entitled to take a view.

53. So far as the fifth ground of appeal is concerned, it was submitted that the judge's interpretation of the Chief Constable's use of the phrase "frivolous and vexatious" was correct and plainly open to her. Mr Holl-Allen draws attention to the fact that the phrase was immediately followed in the letter by a colon introducing reasoning relating to delay and other reasons for refusing the appellant's request.

54. I have passed over the response to the fourth ground of appeal because it is linked to the matters raised in the respondent's notice, to which I now turn.

55. The Chief Constable invited the Court to uphold the judge's order on an additional ground, namely that the judge's assumption as to the purpose of regulation 32(2) was incorrect. Despite reservations, Kerr J applied the purposive construction of the regulation adopted in *Crudace* and *Haworth*. It is submitted that he was wrong to do so. Given the ordinary meaning of the words "may, by agreement" in the context of a statutory scheme emphasising finality in decision-making, regulation 32(2) is a consensual and facilitative provision allowing reconsideration of questions affecting pension entitlement by agreement so as to avoid the delay and expense of an appeal or judicial review. It does not by itself confer a further right of appeal. Mr Holl-Allen submitted that there is a crucial distinction between an appeal or judicial review on the one hand, in which ordinarily there will be a dispute between the officer and the police pension authority requiring non-consensual resolution, and a reconsideration under regulation 32(2), where there is not.

56. Mr Holl-Allen submitted that the decisions in *Crudace* and *Haworth* have converted what he described as a seemingly innocuous provision for resolution by agreement into a freestanding, non-consensual, right of appeal without limit of time, subject only to a threshold requirement of the officers showing a reasonable case capable of being decided in his favour on a reconsideration. Although it was not submitted that any time limit should be read into regulation 32(2) it was argued that the timeframe for requests under that provision should ordinarily be expected to be of the same order as those for an appeal or judicial review. He added that, if *Crudace* and *Haworth* were correctly decided, judicial review of a police pension authority's refusal to agree to a further reference under regulation 32(2) may be a more attractive option for the claimant as a means of challenging the medical authority's decision than an appeal pursuant to regulation 31. Indeed, that seems to have been precisely the view held by King J in *Haworth* (see paragraph 97 of his judgment, quoted above). Mr Holl-Allen submitted that insufficient attention was given by the judges in *Crudace* and *Haworth* to the right of challenge by appeal under regulation 31 and that the interpretation of the statutory purpose of regulation 32(2) in those cases has given rise to the potential for a new category of costly and drawn-out litigation as to the circumstances in which consent ought or ought not to be withheld to a further reference, to the detriment of finality in decision-making.

57. Although Kerr J (with evident reluctance) felt constrained to adopt the purposive construction of regulation 32(2) promulgated in *Crudace* and *Haworth*, he did not accept King J's observation that it was not open to a police authority to refuse a request for a further medical reference on the grounds of delay alone. Kerr J held that the Chief Constable had been entitled to take into account the impact of delay when considering whether to agree to a further reference. He also held that the costs of the process of reopening the case could also be a relevant consideration. It is submitted on behalf of the respondent that the judge's interpretation is to be preferred to the view expounded in *Crudace* and *Haworth*.

Discussion

58. Looking at the overall scheme of Part 4 of the 2006 Regulations, I respectfully disagree with the purposive interpretation of regulation 32(2) adopted by the judges at first instance in *Crudace* and *Haworth*. I agree with the concerns expressed by Kerr J at first instance in this case that the interpretation propounded in those cases strained the language of the regulation. As Kerr J suggested, it is safer to discern the policy

underpinning legislation from the language used rather than construe the language by reference to a broad judicial construction of the overall policy of the statutory scheme. The key words in regulation 32(2) are "by agreement". As Kerr J observed, had Parliament intended to impose an obligation on a police pension authority to refer a case for a further medical opinion, it would have been a straightforward exercise to express that obligation in appropriate language. Accordingly, I accept the argument in the respondent's notice that, given the ordinary meaning of the words used, regulation 32(2) should be construed as a consensual and facilitative provision allowing reconsideration of questions affecting pension entitlement by agreement so as to avoid the expense and delay of an appeal or application for judicial review. Such a construction is particularly pertinent in the context of a statutory scheme which emphasises the importance of finality in decision-making.

59. In deciding whether or not to agree to a request for a reference under regulation 32(2), the police pension authority must, of course, act reasonably, taking into account relevant considerations and excluding any irrelevant matters. The strength of the merits of the underlying claim is, plainly, a relevant consideration, but it does not have the elevated importance ascribed it by Mr Lock. Other factors, including any delay in applying for a further reference, are plainly relevant. I agree with Kerr J that delay is relevant not only as to whether a fair consideration is possible but also in its own right, given the public interest in finality in determining an entitlement to a pension, emphasised in clear language throughout the regulations. I also agree with Kerr J that the cost involved in the process of reconsideration is a relevant factor, although, like him, I do not consider it to have been a primary factor in the Chief Constable's decision to decline to agree to a further reference in this case.

60. The weight to be attached to all relevant factors is a matter for the decision-maker. In this case, I am satisfied that the Chief Constable had all relevant matters in mind and balanced them appropriately when reaching a conclusion that was manifested within her discretion. I have considered her description of the claim as "frivolous and vexatious" and I agree with the judge that, in the context in which that phrase is used, it plainly refers to her conclusion that the long delay between the abandonment of the appeal in 2003 and the request for a further reference in 2016 rendered a fair consideration impossible. I do not, frankly, think it likely that I would have described the claim in those words, but I see no reason to disagree with the judge's analysis about the use of the phrase in all the circumstances of this case.

61. At the heart of Mr Lock's argument is his assertion that the fundamental principle, derived from the ***Laws*** judgment, is that, once a medical authority has reached a decision under the regulations, a later medical authority is bound by what Laws LJ described as the "essential judgment or judgments" on which the earlier decision is based. It is therefore important to understand the context of the decision in that case. ***Laws*** concerned a reassessment under regulation 37 of the level of an injury pension already in payment under the regulations. Regulation 37 requires the police pension authority at intervals to consider whether the degree of the pensioner's disablement has altered. If it finds that the degree of disablement has substantially altered, the level of pension must be revised. The only duty on the authority carrying out the review is to decide whether there has been any substantial alteration in the degree of the pensioner's disablement. In all other respects, the requirement of finality which underpins the regulations prevents the authority carrying out the review from

conducting any re-evaluation. It was in that context, therefore, that the Court of Appeal held that it was not open to a SMP, on a periodic review of an injury pension under regulation 37, to revise the level of pension on the grounds that the clinical basis of an earlier assessment of the pension's degree of disablement had been wrong.

62. Regulation 32(2) is crafted in very different terms. Unlike regulation 37, which relates to periodic reviews of a pension already in payment, the option of a further reference to the medical authority is unrestricted in time. Furthermore, unlike a regulation 37 review, which only authorises reconsideration of whether the degree of the pensioner's disablement has altered, a further reference under regulation 32(2) may, by agreement, be made in respect of any final decision of a medical authority. In my judgment, the words "any final decision" manifestly incorporates not only the decision itself but also evidence on which the decision is based. There is no reason in language, logic or policy to restrict the scope of the reference in the way in which review under regulation 37 is limited. On the contrary, the purpose of regulation 32(2) is to allow the claimant and police pension authority, by agreement, to avoid an unfair outcome which the finality of decisions might otherwise create.

63. To my mind, this interpretation is consistent with the scheme of Part 4 of the 2006 Regulations as a whole, and also Part H of the 1987 Regulations. Regulation 30(6) of the 2006 Regulations provides that the decision of an SMP on the questions referred to him under regulation 30 shall be final, subject to regulations 31 and 32. This mirrors the provisions in regulation H1(5) of the 1987 Regulations. Regulation 31(3) of the 2006 Regulations empowers the board of medical referees, when determining an appeal by a person dissatisfied with the decision of the SMP in a report under regulation 30(6), to express this decision in a report when it decides on any of the questions referred to the SMP on which it disagrees. In those circumstances, the decision of the board shall be final, subject to regulation 32. This mirrors the provision in regulation H2 of the 1987 Regulations. In regulation 32(1) of the 2006 Regulations, a court hearing an appeal under regulation 34, or a tribunal hearing an appeal under regulation 35, may, if they considered the evidence before the medical authority who has given the final decision was inaccurate or inadequate, refer the decision of that authority back for further reconsideration in the light of such facts as the court or tribunal may direct. Thereafter, the medical authority must reconsider the decision and, if necessary, issue a fresh report which, subject to any further reconsideration under regulation 32(1), shall be final. This mirrors a similar provision in regulation H3(1) of the 1987 regulations.

64. In all of these instances, there is nothing in the regulations to restrict the reconsideration of the decision to the decision itself, excluding any consideration of the diagnosis or other evidence on which the decision was based. To my mind, it would be illogical and unworkable were those conducting the reconsideration not to be able to revisit that diagnosis or consider other evidence about it.

65. I recognise, of course, that regulation 30(1) stipulates that a decision of a duly qualified medical practitioner under regulation H1(2) of the 1987 Regulations as to the questions whether the person concerned is disabled and, if so, whether the disablement is likely to be permanent shall be binding for the purposes of the 2006 Regulations. All parties agree that this precludes reconsideration of those decisions under regulation 32(2). As the judge noted (at paragraph 44 of his judgment), it was not disputed before him that Dr Gandham's certificate provided a binding affirmative

answer to the two questions posed by what is now regulation 30(2)(a) and (b), namely "whether the person concerned is disabled" and "whether the disablement is likely to be permanent". But I do not accept the submission advanced behalf of the appellant that this precludes any reconsideration of the evidence on which those decisions were based when a further reference to a medical authority is made under regulation 32 to reconsider a decision as to whether the disablement is the result of an injury received in the execution of duty.

66. I recognise that, in reaching this conclusion, I am disagreeing with the interpretation preferred by Lane J in the ***Evans*** case. Given that judge's very considerable experience in this area, this is not a step I take lightly. But, in my respectful view, in addition to the "sound policy reason" identified in paragraph 37 of Lane J's judgment, it is as a matter of principle of the utmost importance, both to the individual police officer and to the wider community, that a decision about the level of a police officer's injury pension be taken after a fair and accurate assessment of the evidence relied on when determining the questions identified in regulation 30. Where there has been an earlier final decision under regulation H1 of the 1987 Regulations about the questions whether the person is disabled and, if so, whether the disablement is likely to be permanent, that decision is binding for the purposes of the 2006 Regulations and therefore binding on the SMP who is considering under regulation 30(2) 2006 Regulations whether the disablement is a result of an injury sustained in the execution of duty and the degree of the person's disablement. But I can see no reason why the diagnosis arrived at in the earlier assessment under regulation H1(2) of the 1987 Regulations should be binding on the SMP conducting the later assessment under regulation 30(2)(c) and (d) of the 2006 Regulations. There are sound reasons in logic and policy why the diagnosis should not be binding and, in my view, with great respect to Lane J, I do not agree that the language of regulation 30 suggests that it is. On this point, I prefer the interpretation favoured by HH Judge Pelling QC at paragraph 35 of his judgment in ***Doubtfire***.

67. Given the uncertainty about the diagnosis in this case, it follows that Kerr J was entitled and indeed right to refuse to reach a conclusion as to whether Dr Gandham had made an error in refusing the original claim. I reject Mr Lock's submission that this is a matter of black letter law. It is, rather, a matter of fact and law which could not be determined unless and until a reference was made. I agree with Mr Holl-Allen that it would have been both unnecessary and inappropriate for the judge to determine at this stage whether Dr Gandham's original decision was wrong.

68. Drawing these threads together, I conclude that the appeal should be dismissed and the judge's decision upheld on the bases set out his judgment and in the respondent's notice, for the following reasons:

    (1) Regulation 32(2) of the 2006 Regulations should be construed as a consensual and facilitative provision allowing reconsideration of questions affecting pension entitlement by agreement.

    (2) In deciding whether or not to agree to a request for a reference under regulation 32(2), the police pension authority must act reasonably, taking into account only relevant considerations.

(3) The weight to be attached to the relevant considerations is a matter for the decision maker.

(4) The merits of the underlying claim are one factor, but in assessing the merits the authority is entitled to take into account the fact that the evidence is not clear-cut.

(5) In assessing the questions under regulation 30(2)(c) and (d), the SMP is bound by the answers of an earlier SMP who carried out an assessment of the questions under regulation H1(2)(a) and (b) of the 1987 Regulations, but not by any diagnosis underpinning those answers.

(6) A police authority is entitled to take into account any uncertainty about the diagnosis when deciding whether to agree to a reference under regulation 32(2) of the 2006 Regulations.

(7) Amongst the other factors which a police authority is entitled to take into account when deciding whether or not to agree to a reference under regulation 32(2) is any delay in pursuing the claim, together with the costs of any reference.

(6) Given the length of the delay in this case, and the uncertainty about the diagnosis, Kerr J was entitled, and indeed right, to conclude that it was open to the Chief Constable to conclude that a fair reconsideration of Ms Boskovic's claim for an injury pension would not be possible.

NICOLA DAVIES LJ

69. I agree.